Supreme Court, U.S.
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No. 92-328

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CLARK R. INGRAM, GEORGE M. INGRAM,
GARY C. INGRAM and GREGORY B. INGRAM,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state agency violates due process by requiring the current holder of permits for a specific mine to treat polluted water discharging from the mine so that it meets water quality criteria set in a regulation that had gone into effect six years earlier.

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Respondent, the Commonwealth of Pennsylvania, Department of Environmental Resources, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram in this matter.

STATEMENT OF THE CASE

This case concerns three polluted discharges of acid mine drainage that flow into a stream from a surface coal mine in Clearfield County, Pennsylvania that is known as the "Frenchville" mine site.[1] Two of the discharges emerge from the ground at the "toe of spoil," the perimeter of the area that was excavated and later replaced or "backfilled" during the mining operations. The third discharge is emitted by an outlet pipe in a sediment pond constructed on the mine site. (Reproduced Record ("R.R.") 376a-377a, 406a, 407a-409a, 412a-415a, 416a, 422a-425a, 426a-427a, 428a)

In August, 1988, Respondent, the Commonwealth of Pennsylvania, Department of Environmental Resources ("Department"), issued the Petitioners and two other parties an administrative order directing them to treat the three discharges of acid mine drainage that were emanating from the Frenchville mine site. The administrative order required that the treatment of the discharges attain certain water quality standards, commonly referred to as "effluent limits," set forth in a regulation that had been promulgated in 1982 and codified at 25 Pa. Code § 87.102. *See* 12 Pa. Bull. 2382, 2473, 2517 (July 31, 1982). The administrative order was purely remedial, imposing neither criminal nor civil sanctions against any of the recipients. No criminal or civil penalty has been imposed against the Petitioners in the four years since the issuance of the administrative order.

Petitioners portray this case as one involving "pre-existing" discharges of acid mine drainage upon which their mining operations had no impact whatsoever. The evidence presented during a five-day hearing before the administrative tribunal below, the Pennsylvania Environmental Hearing Board, presents quite a different picture. Petitioner Clark R. Ingram testified that the partnership formed by him and his three sons removed between 50,000 and 100,000 tons of coal from the Frenchville surface mine. (R.R. 346a)

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[1] It is indisputable that like the village from which it derives its name, the Frenchville mine site is located in Clearfield County, not, as the Petitioners state, in Clarion County. (Petition, p. 6)

In doing so, Petitioners disturbed an area covering 27 acres. (R.R. E106) These coal removal operations took place in the "recharge area" for the three discharges at issue, that is, the surface area from which the cited discharges obtain their flow. (R.R. 459a) The Petitioners also physically affected all three of the cited discharges. They built the sediment pond that emits one of the discharges, and they attempted to seal the two "toe of spoil" discharges by burying them under mine spoil[2] and topsoil. (R.R. 347a, 378a-380a, 398a-399a)

The Petitioners' Statement of the Case does not mention that the Petitioners continue to hold the only mining permits that the Department ever has issued for the Frenchville site. When the Petitioners applied for those permits in 1976, a Department mine inspector examined the proposed mine site and its vicinity. The inspector reported finding three "spring discharges" on the site, but he did not attribute them to prior mining activity. To the contrary, the inspector wrote on his pre-mining inspection report that "[s]trip mining at this proposed operation will be in area where no previous strip mining was done," and added that he "could not find any indication of there having been deep mining in this area." (R.R. E115-E119) Later that same year, the Department issued the Petitioners two permits pertaining to the Frenchville mine site. The Petitioners' partnership is the only party that ever has been listed as the permittee on those two permits, which remain in effect today. (R.R. 285a)

The mining permits governing the Frenchville site contain a number of "special conditions." The only one of these conditions that pertains to "pre-existing" discharges provides that "[g]ravity drainages, encountered from previous mining, shall be treated to neutrality until eliminated." (R.R. E21) A separate special condition in that same permit applies specifically to sediment ponds. It requires that "[a]ny discharge from settling basins designed for siltation below

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[2] Mine spoil is part of the material that is excavated in order to reach underlying seams of coal during the surface mining process. The mine spoil, which is replaced during the backfilling of the excavated area, often contains pyrite. When exposed to oxygen and water, pyrite generates acid mine drainage.

the toe of spoil shall have a pH between 6.0 and 9.0 and an iron concentration of less than 7.0 ppm [parts per million]." (R.R. E22) Those same effluent limits have applied to all surface mine discharges since 1982 under the regulation cited in the 1988 administrative order. *See* 25 Pa. Code § 87.102(a).

Finally, the Petitioners fail to mention in their Statement of the Case that a proceeding related to this case is pending before the Supreme Court of Pennsylvania. On July 9, 1992, the Commonwealth Court of Pennsylvania enforced the 1988 administrative order by directing the Petitioners and one other party to treat the Frenchville site discharges, which have received no treatment in the four years since the issuance of the administrative order. On August 10, 1992, the Petitioners appealed the Commonwealth Court's July 9, 1992 order to the Supreme Court of Pennsylvania at No. 47 W. D. Appeal Docket 1992, where the matter remains pending. In that appeal, the Petitioners assert that the Department is unable to compel them to comply with the 1988 administrative order.

REASONS FOR DENYING THE WRIT

This case does not merit this Court's review. The issue presented in Section 1 of the Petition was not raised at all before the state courts below. The state courts did not reach the issue presented in Section 2 of the Petition, the constitutionality of retroactive application of a state regulation, because they determined that the regulation had not been applied retroactively. Both issues are likely to be moot if the Petitioners prevail on the appeal that remains pending before the Supreme Court of Pennsylvania.

Petitioners point to no conflict between decisions of lower tribunals that may be resolved through the disposition of this case. The matter at issue involves the enforcement of Pennsylvania statutes and regulations in unique circumstances at a single surface mine. Among the unique circumstances that cloud the legal issues that the Petitioners raise are the facts that the Petitioners' mining operations had direct physical impacts on all three of the discharges at issue, and

the special conditions in the mining permits that the Petitioners still hold directly require the Petitioners to treat the Frenchville mine discharges. The Petition for Writ of Certiorari contains no indication that the issues raised have the kind of national importance that might make them worthy of this Court's attention. Indeed, the Petition does not indicate that any similar situation has arisen even within Pennsylvania.

The Department briefly demonstrates below that the issues presented in the Petition are patently without merit. The administrative order at issue is not retroactive because it requires the current permittee for a surface mine to treat existing discharges from the mine so that they meet the current water quality criteria. Even if construed to have retroactive effects, the order clearly satisfies the applicable due process standards because it constitutes a rational means of achieving the legitimate goal articulated by the Pennsylvania Legislature of preventing and eliminating stream pollution in Pennsylvania. The Petitioners' new-found theory that the purely remedial, administrative enforcement action at issue here conflicts with decisions of this Court concerning criminal prosecutions for constitutionally-protected activities is ludicrous. Indeed, the reliance in the Petition upon three decisions of this Court that the Petitioners never cited below confirms that the Petitioners have gone to desperate lengths to concoct a reason for granting review.

1. The Federal Questions Presented in the Petition Were Not Raised and Passed Upon by the State Courts Below.

The Opinion of the Commonwealth Court of Pennsylvania below states that the Petitioners raised two issues: 1) Equitable estoppel/laches; and 2) retroactive application of the law. *Ingram v. Department of Environmental Resources*, 141 Pa. Commw. Ct. 324, 330-33, 595 A.2d 733, 736-377 (1991), *petition for allowance of appeal denied*, ___ Pa. ___, 607 A.2d 257 (1992). (Appendix to Petition for Writ of Certiorari, pp. A-11 through A-17) The Commonwealth Court rejected the Petitioners' equitable estoppel/laches claim solely on state law grounds without mentioning

the Fourteenth Amendment to the United States Constitution or due process. (Appendix, pp. A-11 through A-15)

Petitioners have abandoned the doctrines of equitable estoppel and laches. Instead, they contend in Section I of the Petition, for the very first time, that requiring them to remove pollutants from the Frenchville mine discharges conflicts with this Court's decisions in *Marks v. United States*, 430 U.S. 188 (1977), *Cox v. Louisiana*, 379 U.S. 559 (1965), and *Raley v. Ohio*, 360 U.S. 423 (1959). Without doubt, this issue was not properly preserved for review.

The Petitioners did not cite a *single* decision of this Court in either the opening brief or the reply brief that they submitted to the Commonwealth Court of Pennsylvania. In light of this fact, the Petitioners show unbelievable hubris in accusing the Commonwealth Court of having "misinterpreted, misapplied and ignored precedents of this Court[.]" (Petition, p. 32) The Petitioners now claim that the Commonwealth Court's ruling was plainly at odds with *Marks*, *Cox*, and *Raley*, yet they cited none of those three decisions in the 46-page Petition for Allowance of Appeal that they submitted to the Supreme Court of Pennsylvania.[5] Nevertheless, the Petitioners have the audacity to accuse the Supreme Court of Pennsylvania of having "ignored" the three decisions that the Petitioners themselves did not cite. (Petition, p. 19)

The second issue that the Petitioners raised before the Commonwealth Court, retroactivity, had two components. The first component was the contention that the Department had applied the mine discharge regulation, 25 Pa. Code § 87.102, retroactively. Invoking the strong presumption under Pennsylvania law against retroactive application of regulations, *e.g.*, *R & P Services, Inc. v. Department of Revenue*, 116 Pa. Commw. Ct. 230, 234-35, 541 A.2d 432, 434 (1988), the Petitioners asserted that a retroactive

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[5] The only decision of this Court that the Petitioners cited below was the century-old case of *Hurtado v. California*, 110 U.S. 516 (1884), which they cited in their Petition for Allowance of Appeal to the Supreme Court of Pennsylvania to support the rudimentary proposition that "[t]he United States Supreme Court has long recognized that the due process clause of the Fourteenth Amendment of the United States Constitution was intended to protect the individual from the arbitrary exercise of the powers of government." (Appendix, pp. A-81 through A-82)

construction of the regulation was impermissible under state law. (Appendix, pp. A-104 through A-109)[4] The second component was the claim that in the circumstances presented, retroactive application of the regulation violated the guarantee of due process under the state and federal constitutions. (Appendix, pp. A-109 through A-115)

The Commonwealth Court never reached the second, constitutional question. Rather, it held that the Department's application of its current regulation to existing mine discharges did not constitute retroactive application of the law at all. *Ingram v. Department of Environmental Resources*, 141 Pa. Commw. Ct. 324, 332, 595 A.2d 733, 737 (1991). (Appendix, pp. A-15 through A-17) The Supreme Court of Pennsylvania declined to review that determination. *Ingram v. Department of Environmental Resources*, __ Pa. __, 607 A.2d 257 (1992). *Cf. Clark v. Jeter*, 486 U.S. 456, 460 (1990)(determination of whether Pennsylvania statute applied retroactively was matter of state law). The courts below simply did not reach the issue of whether retroactive application of the mine discharge regulation satisfies the due process standard of furthering a legitimate legislative purpose through rational means. Petitioners offer no compelling reason why this Court should decide an issue that the courts below found no need to address.

II. The Decision of the Commonwealth Court of Pennsylvania Upholding a Purely Remedial Administrative Order Does Not Conflict With This Court's Decisions in *Marks*, *Cox*, and *Raley*

This Court's decisions in *Marks*, *Cox*, and *Raley* have nothing to do with this case. All three decisions involve *criminal* prosecutions for conduct that implicated fundamental constitutional rights, thereby

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[4] Petitioners repeated this assertion in their Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. (Appendix, pp. A-86 through A-88)

raising due process concerns to their pinnacle.[5] In contrast, the administrative order at issue in this case is purely remedial -- it merely requires the Petitioners to remove pollutants from the three Frenchville mine discharges. Not only have no *criminal* charges been filed against the Petitioners, the Commonwealth of Pennsylvania has not even sought to impose *civil* penalties against them. And unlike *Marks*, *Cox*, and *Raley*, this case involves purely economic activity, which evokes minimal due process scrutiny. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976)(*citing Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955)).

Petitioners' assert that they were "entrapped" because they believed that water quality standards found in a regulation that was rescinded in 1982 would *forever* govern any discharges from the Frenchville mine. But the permit conditions quoted in the Statement of the Case (pp. 3-4, above) gave Petitioners ample warning that they could be required to treat discharges from the Frenchville site "to neutrality until eliminated." Furthermore, one of the leading decisions in Pennsylvania environmental law, *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 319 A.2d 871 (1974), which was issued two years before mining began at the Frenchville site, clearly forewarned Petitioners that even after the operations at a mine ceased, discharges from the mine would have to satisfy newly-enacted water quality standards. *Id.*, 455 Pa. at 393-403, 416-18, 319 A.2d at 873-77, 884-85 (Fourteenth Amendment did not preclude Commonwealth from applying 1970 statute to discharge from underground mine that had been closed and properly sealed in 1969). So warned, the Petitioners could in no sense have been "entrapped" by the Commonwealth of Pennsylvania.

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[5] Two other decisions of this Court cited in Section I of the Petition similarly involve criminal prosecutions for conduct that implicates specific constitutional rights. *See Rabe v. Washington*, 405 U.S. 313 (1972)(per curiam)(prosecution under obscenity statute for exhibition of motion picture); *Boute v. City of Columbia*, 378 U.S. 347 (1964)(prosecution for criminal trespass arising from sit-in protest against refusal to serve blacks in drug store restaurant).

III. Issuing the Current Permittee of a Surface Mine an Order that Applies a Regulation Promulgated in 1982 to Mine Discharges Existing in 1988 is not an Unconstitutionally Retroactive Application of the Law.

A. The 1988 Administrative Order Did Not Apply the Law Retroactively.

The Department's 1988 administrative order cited the three Frenchville site discharges for being in violation of the effluent limits listed in Section 87.102 of the regulations governing surface coal mining in Pennsylvania, 25 Pa. Code § 87. 02.[6] Section 87.102 was promulgated in 1982 as part of the Department's successful effort to obtain primary jurisdiction over surface mining in Pennsylvania from the United States Department of the Interior. By its terms, Section 87.102 applies only prospectively to discharges, like those cited in the 1988 administrative order, existing on or after its effective date of July 31, 1982. *See* 12 Pa. Bull. 2382, 2473, 2517 (July 31, 1982).

It is well settled that "[a] statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Reynolds v. United States*, 292 U.S. 443, 449 (1934). In this case, the Department need only point to *present* facts and conditions to support its application of Section 87.102.

The Department has not, as the Petitioners claim, applied a new regulation to past mining operations. Rather, the Department has required the *current* permit holders, the Petitioners, to treat discharges that *currently* are emanating from the Frenchville mine so that those discharges comply with the *current* regulations governing

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[6] The excerpts from Section 87.102 that are quoted at pages A-74 to A-76 of the Appendix to Petition for Writ of Certiorari are from the version of the regulation that was in effect when the administrative order was issued in 1988. Amendments to the regulation went into effect roughly one year ago upon their approval by the United States Department of Interior. *See* 20 Pa. Bull. 3383, 3413-14 (June 16, 1990)(text of amendments), 21 Pa. Bull. 3316, 3321 (July 27, 1991)(effective date). These amendments do not materially alter the effluent limits that were cited in the 1988 administrative order.

discharges from surface mines. The fact that the present discharges, and not past mining operations, are the focus of concern is conclusively demonstrated by the fact that if the discharges either did not exist or met the current effluent limits, the 1988 administrative order simply would not have been issued.

The analysis of this issue by the Commonwealth Court of Pennsylvania was right on the mark. Finding that "[t]he stream pollution which emanates from the Frenchville site formerly mined by the [Petitioners] is a continuous and ongoing occurrence," the Commonwealth Court held that the Department's 1988 administrative order was not an attempt to apply the law retroactively but rather an application of "current regulations to a current violation[.]" *Ingram*, 141 Pa. Commw. Ct. at 332, 595 A.2d at 737. Other courts similarly have held that environmental laws, like the regulation at issue here, that require correction of current, harmful conditions are not retroactive even if the acts giving rise to the conditions took place before the law went into effect. *See, e.g., American Mining Congress v. United States Environmental Protection Agency*, 965 F.2d 759, 769-70 (9th Cir. 1992) (new regulations governing storm water discharges from inactive mines are not retroactive because they do not penalize owners of inactive mines for either past mining activities or contaminated discharges that occurred in the past); *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 741 (8th Cir. 1986)(Resource Conservation and Recovery Act "is not retroactive because it imposes liability for the *present* and *future* conditions resulting from past acts")(emphasis in original), *cert. denied*, 484 U.S. 848 (1987).

B. Any Retroactive Effects of the 1988 Administrative Order Satisfy the Constitutional Standard of Furthering a Legitimate Legislative Purpose Through Rational Means.

Even if they have retroactive effects, laws "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality" that can be overcome by one complaining of a due process violation only by proving that the lawmaker acted in an arbitrary and irrational way." *Turner Elkhorn*, 428 U.S. at 15.

Such a law is not unconstitutional "solely because it upsets otherwise settled expectations," even if it does so by "impos[ing] a new duty or liability based on past acts." *Id.* 428 U.S. at 16 (citations omitted). Although retroactive civil legislation may violate due process if it is "harsh and oppressive," *Welch v. Henry*, 305 U.S. 134, 147 (1938), this Court has made it clear that the "harsh and oppressive" standard "does not differ from the prohibition against arbitrary and irrational legislation that [was] clearly enunciated in *Turner Elkhorn*." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984). Under this standard, retroactive application of a civil law satisfies due process if "a legitimate legislative purpose [is] furthered by rational means." *General Motors Corp. v. Romein*, ___ U.S. ___, 112 S. Ct. 1105, 1112 (1992)(citing *Gray*, 467 U.S. at 730).

Petitioners have made no effort to demonstrate that any retroactive effects of the application of the Section 87.102 effluent limits in this case cannot be "justified by a rational legislative purpose." *Gray*, 467 U.S. at 730. One of the statutes pursuant to which Section 87.102 was promulgated, Pennsylvania's Clean Streams Law,[7] has as one of its stated objectives "not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted." Pa. Stat. Ann. tit. 35, § 691.4(3) (Purdon 1977). It cannot be gainsaid that the 1988 administrative order, which requires the removal of pollutants from mine discharges that flow into streams in Pennsylvania, serves this rational, laudable legislative purpose.

Given that the prevention and elimination of stream pollution are legitimate legislative objectives, the only remaining question is whether the Department has sought to achieve those objectives in a rational manner. *Romein*, 112 S. Ct. at 1112; *Turner Elkhorn*, 428 U.S. at 18-19. In this case, the Department has placed the responsibility for treating the discharges emitted by the Frenchville mine upon a party that extracted between 50,000 and 100,000 tons of coal from the mine, physically affected all three discharges during its

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[7] *See* 12 Pa. Bull. 2473 (July 31, 1982)(listing statutory authority for promulgation of surface coal mining regulations).

mining operations, and continues to hold the only mining permits ever issued for the site. In so doing, the Department cannot be said to have "acted in an arbitrary and irrational way." *Id.* at 15. As a result, even if it is thought to place burdens upon the Petitioners' mining retroactively, the Department's 1988 administrative order satisfies the requirements of due process. *See Gray*, 467 U.S. at 733.

CONCLUSION

For the reasons presented above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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